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Beyond open and closed borders: the grand transformation of citizenship*

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ABSTRACT

The Jurisprudence Lecture, delivered by Ayelet Shachar, challenges the established dichotomy between open and closed borders, showing that one of the most remarkable developments of recent years is that borders are simultaneously *both* more open *and* more closed. Membership boundaries are not fixed or static. Instead, they expand or shrink, selectively and strategically, depending on the target populations they encounter. Moving beyond the open-closed binary, Shachar conceptualises a far more dynamic, multifaceted, and kaleidoscopic process, which we might call the *grand transformation of citizenship*. Drawing on a rich set of comparative examples, this article explores three intersecting yet analytically distinct dimensions of the realignment of citizenship: the territorial, the cultural, and the economic. This framework of analysis highlights the interconnected facets driving this transformation, and considers the puzzles that emerge when we think about them in tandem. The moving parts that together comprise this transformation generate novel strategic possibilities for the state, which in turn creates new latitudes for the few and new restrictions for the many. Shachar's goal, ambitious from the start, is to engage in theory-building by articulating the form and function of each of these facets of transformation. She further demonstrates how their variable combinations intermingle to police and restrict (or alternatively, relax and facilitate) access to membership in a globalising world, determining who may overcome the odds in the birthright lottery.

KEYWORDS

Citizenship; migration; inequality; law; naturalisation; borders; membership; boundaries; territory; culture; wealth

Contemporary political and legal theory is preoccupied with the debate between open and closed borders. In this contribution, I wish to disrupt this established dichotomy by showing that one of the most remarkable developments of recent years is that borders are *both* more open *and* more closed, simultaneously. Membership boundaries are not

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fixed or static. Rather, they expand or shrink, selectively and strategically, depending on the target populations they encounter. Moving beyond the open–closed binary, I conceptualise a more dynamic, multifaceted, and kinetic process, which I call the *grand transformation of citizenship*. The moving parts that together comprise this transformation can intersect in a diversity of ways, creating seemingly endlessly shapeshifting borders and boundaries.

For the sake of lucidity and parsimony, my discussion considers three intersecting yet analytically distinct dimensions of the realignment of citizenship: the *territorial*, the *cultural*, and the *economic*.¹ In each of these domains, governments the world over are using a versatile toolbox of ‘line-drawing’ techniques to accomplish goals that appear contradictory, both ‘tightening’ and ‘lightening’, restricting and relaxing, constricting and loosening the requirements of access to membership – all at the same time.

A visual image can help illuminate the model I have in mind, and the wide horizons it opens up for further research. Consider a standard childhood tic-tac-toe boardgame, wherein each player seeks a horizontal, vertical, or diagonal row in order to win. Now imagine the possibilities that emerge when this two-dimensional boardgame is turned into three-dimensional “cubic” format, adding a new dimension of strategy and opportunity. Similarly, we can think of modern citizenship as operating in 3D, too, with the interactions among its territorial, cultural, and economic dimensions generating novel tactical possibilities, which in turn create new latitudes for the few, not to mention new restrictions for the many. It is this tremendous versatility that makes the grand transformation of citizenship an ever more compelling topic of investigation.

I will highlight the interconnectedness of these patterns of change, and consider the puzzles that emerge when we evaluate them in tandem. Their variable combinations intermingle to delineate and restrict (or alternatively, relax and facilitate) access to membership in a globalising world, determining who among those not born in affluent countries may overcome the odds in the birthright lottery.² These sorting methods are producing overt and covert inequalities that modern states are formally committed to abolishing, at the same time as they establish new global hierarchies. These changes invite us to dig deeper and rethink the architecture of citizenship and its unequal allocation, whether at birth or later in life.

The bulk of my discussion is devoted to elucidating the tripartite facets of citizenship’s grand transformation. In part 1, I explore the rise of visible – and also not so visible – shifting borders as part of the reinvention of territory by states, acting alone or in concert. In part 2, I consider the resurgence of claims of culture and identity in assessing the ‘suitability’ of the newcomer, and the alchemy of bringing together value-laden civic integration requirements with a neoliberal insistence on the individual responsibility of the immigrant to establish herself as a productive, reliable, and non-threatening future member of the polity.

In part 3, I turn to examine how wealth as a criterion for citizenship – once discredited in post-revolutionary democratic societies – is now seeing a come-back. ‘Earning a living’ has become an official precondition for naturalisation in a growing number of countries,

¹The model of the transformation of citizenship that I develop is sufficiently flexible to account for additional dimensions. Due to space limitations, I will highlight only these three key examples.

²Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009).

merging economic and cultural perceptions of membership that distinguish between those who ‘deserve’ (or have ‘earned’) the right to stay, and those who are perceived as burdens on a society. By contrast, migrants with hefty amounts of mobile capital that can be swiftly moved across borders with a click of the mouse benefit today from fast-tracked, easy-pass gates of admission with a ‘golden passport’ of their choice, literally buying their way in.

The reinvention of territory, the return of culture, and the resurgence of wealth-based barriers reveal the elasticity and selectivity of the new gates of admission to citizenship. These policies also speak volumes to the value of citizenship, coveted as it is by both states and individuals.³ My goal, ambitious from the start, is to engage in theory-building by articulating the form and function of each of these facets of transformation, and their cumulative effect on defining the openness or closure of a given membership regime. Meanwhile, I intend to reveal the central role of legally coded membership rules and institutions in this grand transformation.⁴

In a world besieged by the COVID-19 pandemic, we are reminded that a deadly virus knows no borders. The same cannot be said of legal structures that construct and govern access to membership – the topic of my inquiry. The perplexing feature of the legal landscape I will chart is that countries simultaneously engage in *both* opening *and* closing their borders, doing so *selectively* depending on whom they wish to admit (for example, those who share the majority’s ethnonational heritage and lineage, or those who ‘compensate’ for their lack of shared heritage with specialised skills, talents, and increasingly, with deep pockets). At the same time, the law erects higher and higher legal walls to block out those deemed threatening, non-self-sufficient, or simply ‘too different’.

This dialectical relationship between restrictive closure and selective openness reveals, quite explicitly, the recalibration of borders and boundaries as ‘public statements about who we are now, who we want to become, and who is “worthy” to join us’.⁵ Counter to prophecies that foresaw the demise of the territorial state and the waning of sovereignty, the illustrative examples I explore here show that borders and membership boundaries show no sign of retreating or vanishing. Instead, they are multiplying and metamorphosing.

The study of this transformation brings to the fore some of the oldest and most profound questions in the book of citizenship: Who legally belongs, and according to what

³By “value” I refer here to the tangible and intangible security, mobility, and opportunity structures that attaches to acquiring full membership status in a well-off state. Whereas significant attention has been paid to the strategic value of citizenship for individuals, my analysis highlights the ways in which state actors, processes, and regulations explicate the view that citizenship is a scarce property that must be tightly guarded, precisely because what is at stake – gaining access to the good of membership – is highly valuable. For further exploration of these themes, see Shachar, *The Birthright Lottery* (n 2). See also Ayelet Shachar and Ran Hirschl, ‘On Citizenship, State, and Market’ (2014) 22 *Journal of Political Philosophy* 231. Economists, anthropologists, and sociologists have attempted to appraise the more quantifiable features of citizenship, although even they admit their analysis cannot capture its full heft and multidimensionality. See e.g., Aihwa Ong, *Flexible Citizenship: The Cultural Logic of Transnationality* (Duke University Press 1999); Branco Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press 2016); Yossi Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset* (Princeton University Press 2019).

⁴On the importance of the legal code in other contexts, see e.g., Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019). Such a grand framework of analysis inevitably requires some degree of abstraction and generalization. For an account that encourages the expansion of our knowledge of big structures and large processes through comparative exploration, see the classic contribution by Charles Tilly, *Big Structures, Large Processes, Huge Comparisons* (Russel Sage Foundation 1984).

⁵David Cook-Martin and David Fitzgerald, ‘Culling the Masses: A Rejoinder’ (2015) 38 *Journal of Ethnic and Racial Studies* 1319. See also Cass R. Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Law Review* 2021.

criteria? How porous (or impenetrable) are the boundaries of solidarity and the gates of admission? Or as one astute observer recently asked: 'how do we determine who is a member, anyway?'⁶ These core queries motivate my inquiry into the grand transformation of citizenship.

The reinvention of territoriality: the 'shifting border'

The modern state *is* a territorial state. In a world created in the Westphalian image,

[s]overeignty is an idea of authority embodied in those bordered territorial organizations we refer to as "states." ... [It] is one of the constituent ideas of the post-medieval world: it conveys a distinctive configuration of politics and law that sets the modern era apart from previous eras.⁷

Under the Westphalian lexis, territory plays a key role in the modern conception of sovereignty and its geography of power. The firm black lines we find in our atlas books represent state territory as if it is forever fixed and insulated, camouflaging the fact that the sovereign exercise of power over 'frozen geography' (as John Agnew once memorably put it) is not natural or pre-political, but rather constructed and reconstructed through law and politics.⁸ In the *post*-Westphalian literature, by contrast, the core prognosis is that the relevance of borders is declining, sovereignty is diminishing, and states as territorially bounded 'containers' of power are dissipating.⁹ Neither of these perspectives captures the new paradigm shift we are witnessing.

The classic Westphalian ideal of statehood sees the border as a permanent and *static* barrier that stands at the frontier of a country's territory. This formidable border serves a crucial role in delimiting (externally) and binding (internally) a nation's territory, jurisdiction, and peoplehood, correlating with a notion of fixed 'legal spatiality'.¹⁰ For many years, this concept permeated our thinking about mobility, borders, and sovereignty, pushing us into what political geographers refer to as the 'territorial trap'.¹¹ This trap, and the assumption undergirding it, reifies and naturalises the global grid of lines demarcating states as though they represent bounded territorial units with mutually exclusive borders. States are envisioned as having a monopoly over the legitimate exercise of power and authority in their clearly-demarcated domains, thereby politicising space and bringing it under juridical control.

In 1989, the fall of the Berlin Wall led many to predict that barbed wire and sealed entry gates would become relics of a bygone era. Today, we find a very different reality. When the Berlin Wall came down, there were fifteen border fences around the world. Today, nearly seventy border fences have either been completed or are under

⁶Will Kymlicka, 'Why Human Rights Are Not Enough' (*New Statesman*, 5 March 2020) <www.newstatesman.com/2020/03/why-human-rights-are-not-enough> accessed 12 May 2020.

⁷Robert Jackson, *Sovereignty: The Evolution of an Idea* (Polity Press 2007) ix, 1.

⁸John Agnew, 'The Territorial Trap: The Geographical Assumptions of International Relations Theory' (1994) 1 *Review of International Political Economy* 53.

⁹On states as 'power containers', see Anthony Giddens, *The Nation-State and Violence: A Contemporary Critique of Historical Materialism*, vol 2 (University of California Press 1985).

¹⁰Kal Raustiala, 'The Geography of Justice' (2005) 73 *Fordham Law Review* 2501. See also John H. Herz, 'Rise and Demise of the Territorial State' (1957) 9 *World Politics* 473, 480–81.

¹¹Agnew (n 8). See also Peter J. Taylor, 'The State as Container: Territoriality in the Modern World-System' (1994) 18 *Progress in Human Geography* 151.

construction.¹² Some of these new barriers, especially those built in Europe, were erected in response to the 2015 refugee crisis. Yet many of the post-Berlin border fences were raised before this recent influx of migrants. Rather than relics of a bygone era, menacing border walls and steel fences have become renovated fortified manifestations of (real or imagined) sovereign control.¹³

Globally, perhaps the most recognisable – and politicised – border wall stretches along parts of the US-Mexico border. Other notable examples include Spain's watchtowers and razor wire fences around Melilla and Ceuta, its enclaves in North Africa; the barrier between Bulgaria (an EU member state) and Turkey; the metal curtain that India has built around its poorer neighbour, Bangladesh; and the new steel fence that Norway is constructing on its arctic border with Russia. To the surprise of many, Europe, with its promise of open borders, has more extensive fencing than the world's most (in)famous border wall. Since the fall of the Berlin Wall, European countries have built, or are in the process of building, approximately 1200 km (or 750 miles) of fencing to keep uninvited people out.¹⁴ Similar patterns emerge when we compare the number of borders guards and police officers involved in border management in EU member states and through Frontex, which dwarfs those in the United States.¹⁵

As important as these visible walled borders are for separating the haves from the have-nots, both symbolically and practically, a new and striking trend has emerged: the surge of *invisible* borders – borders that rely on sophisticated legal techniques to detach migration control functions from a fixed territorial location. The border has broken free of the map; it may extend well beyond the edge of a territory or well into its interior. The unmooring of state power from a fixed geographical marker has created a new paradigm: the *shifting border*.¹⁶

When it comes to migration control, the *location* of the border is shifting. This is part of a strategy that strives, as official government policy documents explain, to 'push the border out' as far away from the actual territorial border as possible. This concept, enthusiastically embraced by governments worldwide, involves screening people 'at the source' or origin of their journey – *not* the destination – and then again at every possible checkpoint along the way. The traditional static border is thus reimaged as the *last* point of encounter, not the first. In this way, the shifting border strategy makes it harder and harder for unwanted and uninvited migrants to set foot in the greener pastures of the more affluent and stable polities they desperately seek to enter. Conversely, as I explain in the final section of this essay,

¹²Ron E. Hassner and Jason Wittenberg, 'Barriers to Entry: Who Builds Fortified Boundaries and Why?' (2015) 40 International Security 157; Elisabeth Vallet (ed), *Borders, Fences and Walls: State of Insecurity?* (Routledge 2018).

¹³For a critical exploration of border walls, see Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books 2010).

¹⁴By way of comparison, as of the end of 2015, the US-Mexico border wall stretched a little over 650 miles, covering roughly one-third of the 2000-mile-long US-Mexico border.

¹⁵Rey Koslowski, 'Addressing Side-Effects of Increasing Border Security Cooperation: A Global Perspective' in Ferruccio Pastore (ed), *Beyond the Migration and Asylum Crisis: Options and Lessons for Europe* (Aspen Institute Italia 2017). Frontex, Europe's border and coastguard agency, was established in 2005. Its budget and personnel have increased exponentially in recent years: from €6 million in 2005 to €98 million in 2014 to €320 million in 2018. See European Commission, 'European Agenda on Migration: Securing Europe's External Borders' (Memo) COM (15) 6332 final (15 December 2015). Frontex has had around 300 operational staff members in 2014, a number that rose to over 1300 in 2018. According to recent proposals by the European Commission, Frontex will hire an additional 8400 border guards, bringing the total number to 10,000 by 2020. See European Commission, 'State of the Union 2018: A Strengthened and Fully Equipped European Border and Coast Guard' (Memo) COM (18) 5715 final.

¹⁶This section draws upon the argument I have developed in Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester University Press 2020).

wealthy migrants wishing to deposit their capital in these very same countries find fewer and fewer restrictions to fast-tracked admission. In a world of mounting inequality and migration pressures, governments frantically search for new ways to expand their remit, both conceptually and operationally, inward and outward, in the process reinventing one of the classic dimensions of sovereignty in the modern era: namely, territoriality.

The shifting border, unlike a reinforced physical barrier, is not fixed in time or place; it consists of mobile legal portals rather than brick-and-mortar walls. Just as the shifting border extends the long arm of the state, ever more flexibly, to regulate mobility half the world away, it also stretches deep into the interior, creating within liberal democracies spaces that have been variably referred to as ‘constitution free’ zones or ‘waiting zones’ (*zones d’attente*), where ordinary constitutional rights are partially suspended or limited, especially in relation to those who do not have proper documentation or legal status. Each of these spatial and temporal contractions and protrusions bears dramatic implications for the scope of rights and protections that migrants and other non-citizens may enjoy, revealing the violence that may be deployed through legal acts that ascribe meaning to bodies in relation to (shifting) borders, prescribing or denying them access and setting people in new relations of power in political spaces of im/mobility.

In 2020, responses to the global COVID-19 pandemic have accelerated this trend. When a cluster of mysterious viral pneumonia cases struck in Wuhan, China in January 2020, neighbouring Asian countries that had already borne the brunt of the SARS and MERS outbreaks – notably Hong Kong, Taiwan, and South Korea – wasted no time. These countries swiftly introduced public health responses that included extensive testing, isolation of patients, and digital contact tracing. But they also quickly introduced another set of measures: travel bans that restricted access to their territories.

Despite these efforts, by March the virus had spread across the globe. In Canada, the government further extended the logic and impact of the measures seen in East Asia, announcing that, not only would passage across its borders be temporarily restricted to citizens and permanent residents, but also that anyone – including its own citizens – presenting with COVID-19 symptoms would be barred from boarding a Canada-bound plane.¹⁷ With this move, Canada stretched its border outward both conceptually and legally. In the process, the country is also perfecting its technique of interdiction abroad, relocating much of its border-control activities to overseas gateways, primarily in Europe and Asia. The result is that regulation of entry into Canada happens in foreign transit hubs that can be located tens, hundreds, or even thousands of miles away.

The United States, too, has extended the long arm of the state outward, ever more flexibly, to regulate mobility at a distance. This was never more evident than on March 11, 2020 with the dramatic proclamation from the Oval Office that the country would suspend travel from twenty-six European countries for thirty days (similar restrictions were later expanded to apply to the U.K. and Ireland). Even in non-pandemic times, travellers wishing to embark on a U.S.-bound flight regularly encounter its border and authorised guardians (U.S. officials located on foreign soil) far away from the coastal and land borders of the United States, in places as far afield as Freeport and Nassau in the Bahamas, Dublin and Shannon in Ireland, and Abu Dhabi in the United Arab Emirates.

¹⁷Transport Canada, ‘Aviation Measures in Response to COVID-19’ (*Government of Canada*) <www.canada.ca/en/transport-canada/news/2020/03/new-measures-for-covid-19-response.html> accessed 17 March 2020.

On any given day, more than six hundred U.S. Customs and Border Protection officials and agricultural specialists are deployed in airports around the world, processing millions of passengers *before* they depart for the United States. Strikingly, such decisions bear the full weight of U.S. law, as though their determinations were made ‘at the border’, rather than at a great distance.¹⁸ This policy is clarified in U.S. government documents: it is preferable to ‘identify and address threats at the earliest possible point’.¹⁹ Controlling the movement of people starts to happen ‘elsewhere’ and not at the actual border.

In recent years, the United States has entered advanced negotiations to build up preclearance capacity at airports overseas. Crisply conveying the rationale of the shifting border, the intent is to ‘take every opportunity we have to push our [operations] out beyond our borders so that we are not defending the homeland from the one-yard line’.²⁰

Such measures may well prove to be the way of the future; they are arguably a regulator’s dream tool for deterring unwanted admission. As noted by the International Organization for Migration (IOM), ‘[m]any States which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their immigration laws and policies’.²¹ These insights were not lost on policymakers when the COVID-10 pandemic took hold.

Governments the world over have deployed a key rationale of the shifting border to regulate mobility from afar, by blocking travellers *prior* to arrival, *before* they embark, and *after* they reach their destination (for example, travellers are given wrist GPS monitors post-arrival to ensure they do not breach their 14-day quarantine). Remarkably, by April 2020, close to 200 countries had curbed either inbound or outbound travel. At the height of the crisis, more than 90 percent of the global population was living in countries that had introduced travel restrictions in response to COVID-19. Faced with the challenge of defeating an invisible virus, such bold measures may have been justified as a matter of urgent necessity. But they also reveal deeper patterns that disrupt and test assumptions about waning sovereignty, while also revealing the limits of the populist push for border-fortification. Counter to the narrative of border walls, it did not require a single sack of cement for President Trump to barricade the United States from travellers arriving from the European Union. Instead, it took only the stroke of a pen to define who may enter (primarily American citizens and permanent residents) and who will be turned away (everyone else, save diplomats and medical experts invited to help tackle the virus). These measures are far-reaching and unprecedented, but they build on a trend that has been evolving over the two decades since September 11, 2001.

The shifting border not only extends the reach of sovereign authority beyond the country’s actual territorial edges; it also seeps into the interior. As part of a major reform to U.S. immigration policy, a procedure called ‘expedited removal’ was introduced into law. This

¹⁸‘Preclearance Locations’ (U.S. Customs and Border Protection) <www.cbp.gov/border-security/ports-entry/operations/preclearance> accessed 4 March 2020.

¹⁹‘CBP Releases Fiscal Year 2015 Trade and Travel Numbers’ (U.S. Customs and Border Protection, 4 March 2016) <www.cbp.gov/newsroom/national-media-release/cbp-releases-fiscal-year-2015-trade-and-travel-numbers> accessed 4 March 2020.

²⁰‘DHS Announces Intent to Expand Preclearance to 10 New Airports’ (U.S. Department of Homeland Security, 29 May 2015) <www.dhs.gov/news/2015/05/29/dhs-announces-intent-expand-preclearance-10-new-airports> accessed 4 March 2020.

²¹‘Refugee Protection and Migration Control: Perspectives from UNHCR and IOM’ (United Nations High Commissioner for Refugees, 31 May 2001) <www.unhcr.org/protection/globalconsult/3b3892256/refugee-protection-migration-control-perspectives-unhcr-iom.html> accessed 12 May 2020.

legal provision permits frontline officers and border agents both to expeditiously return undocumented migrants at the border and to review the legal status of individuals detected up to one hundred miles away from any U.S. land or coastal border, in effect ‘moving’ the border into the territorial interior.

This legal locus hocus-pocus creates what has been referred to as a ‘constitution lite’ zone within the United States – allowing law enforcement agents to set up checkpoints on highways, at ferry terminals, or on trains that require people to provide proof of legal status. Such government surveillance of movement and mobility – traditionally restricted to checkpoints at the actual border – is now seeping into the interior. No less than two-thirds of the U.S. population – more than 200 million people – live in this 100-mile-deep constitution-lite-zone. The bulk of the population of New York state, for example, lies within 100 miles of the land and coastal borders of the United States, as does that of Florida, another mobility and migration hub.²² Government officials have long gone on record declaring that such internal border enforcement measures may well expand ‘nationwide’. Until recently, such a prospect seemed to belong in the realm of dystopian science fiction. No longer. In July 2019, months before the outbreak of the coronavirus, the Trump administration issued a new rule authorising such massive, nationwide expansion, turning the ‘interior’ into an extension of the ‘exterior’ – a shifting border that is *everywhere* and *nowhere*, simultaneously.

With the spread of COVID-19, a growing number of countries are also turning to cyber-tech measures for regulating the movement of their own citizens, deploying surveillance tools typically reserved for counterterrorism and espionage. In Israel, Prime Minister Benjamin Netanyahu announced that ‘all means’ will be used to fight the spread of the new virus, ‘including technological means, digital means, and other means that until today I have refrained from using among the civilian population’. The government moved ahead, bypassing parliamentary approval and oversight, to authorise emergency regulations that give power to the country’s security services to track the movements of people testing positive for the virus, geolocating their cellphones. Such information enables the state to build databases of individual whereabouts, contacts, and social interactions. These measures are not only deeply intrusive but can also be activated *without* the consent of the affected persons, feeding into broader fears that the current moment of crisis will be used by leaders to push for controversial policy changes, citing the pandemic as a justification for such action. This big-brother-like scheme has temporarily been halted by an injunction issued by the Supreme Court of Israel, but valid concerns persist about similar executive power grabs.

From Hungary to Zimbabwe to the Philippines, leaders have used the pandemic as a pretext to invoke emergency regulations to galvanise their executive powers and to drastically curtail dissent. In extreme cases, democratic rulers have taken actions that appear to be drawn straight from the playbook of authoritarianism, such as suspending review by the legislative branch and the justice system.²³ Even in the United States, the Department of Justice has asked Congress to grant the Attorney General power to authorise top judges in the country to pause court proceedings and to detain people indefinitely without trial.

²²‘Constitution Free Zone: The Numbers’ (ACLU) <www.aclu.org/other/constitution-free-zone-numbers> accessed 12 May 2020.

²³‘COVID-DEM’ (Democratic Decay) <www.democratic-decay.org/covid-dem> accessed 13 May 2020.

These are extraordinary measures that would have to be approved by Congress. But the mere fact that they have been proposed reveals how threatening the combination of a deadly virus and the declaration of a national emergency (as was done in the United States) can be to the well-being of a democracy.

In this new fight against an invisible virus, anyone who might become infected (namely, each one of us) faces the paradox of relying more heavily on the government as regulator and provider of essential services, while also potentially fearing the implications of such emergency powers and intrusive mobility-monitoring provisions. Again, we can draw lessons about the latter by exploring measures that, up until now, were reserved for non-citizens in the age of shifting borders.

Even prior to the current crisis, the European Union funded a pilot project, entitled iBorderCtrl, designed to prescreen incoming travellers. The programme requires travellers to ‘perform a short, automated, non-invasive interview with an avatar [and] undergo a lie detector’. The data is then linked to any pre-existing authority data and stored in large databases that are connected with ‘portable, wireless connected iBorderCtrl units that can be used inside buses, trains, or any other point [to] verify the identity of each traveller ... [and] calculate a cumulative risk factor for each individual’. The calculated risk factor will appear in any future border crossing and may lead to further checks or even a denial of entry. The iBorderCtrl avatar is trained to detect human deception by looking for ‘micro-gestures’ – subtle nonverbal facial and bodily cues. While still a volitional screening tool, if deemed successful, iBorderCtrl will be rolled out to monitor non-EU citizens before the start of their journey and throughout their stay in the territories of European Union countries. In the United States, a similar AI-powered screening system may soon become operational that will track changes in blood flow and subtle eye tics. Once set in place, such sophisticated surveillance techniques could soon ‘spill over’ to regulate the mobility of citizens as well, especially in times of crisis. The once-fixed territorial border is thus not just shifting inward and outward, but also multiplying and fracturing. Each person ‘carries’ the border with her as she moves across space and place.

Government officials foresee a future whereby arriving and departing passengers will not require any travel documents. Instead, the body will become our ticket of admission (or conversely, what marks us for denial of entry) as biometric borders expand their reach. Countries such as China, Australia, Japan, the United States, and the United Arab Emirates are leading the way. Dubai International Airport, for example, has introduced a pilot test of new ‘biometric borders’ – known as smart tunnels – in its Terminal 3 and plans to implement the new technology in the remaining terminals later this year. The smart tunnel identifies passengers through a combination of scans of a user’s iris and face, which occurs as you walk through, meaning that no human interaction is needed. The information is then matched with the passenger’s digital profile. Once in the UAE, every citizen and lawful resident, including those on a work visa, must also carry a biometric ID card (known as the Emirates ID), which serves as a ‘personal database of every resident’. This all-encompassing database can be checked and verified by government officials at all times. Measures of migration and population control thus become intertwined with new, powerful technologies of surveillance.

Governments are also proactively developing and implementing futuristic data-mining technologies and predictive analytics as well as bilateral and multilateral agreements with countries of origin and transit that treat the latter as migration ‘buffer zones’ for wealthier

nations (often in exchange for capacity-building and material assistance in the form of development aid). The new conception of the shifting border has coincided with the rise of big data and propagated the creation of vast, unseen databases that store biometric information and electronic records of travellers' identities. Sharing these records prior to travel has replaced traditional interactions between the individual and state officials at the actual territorial border because, as the UK Home Office revealingly puts it, the encounter 'can be too late – they [unauthorized entrants] have achieved their goal of reaching our shores'.²⁴ To achieve this sweeping Orwellian vision, the location, operation, and logic of the border has to be redefined to allow government officials or their delegates (increasingly operating transnationally and in collaboration with third parties and private-sector actors) to screen and intercept travellers earlier, more frequently, and more distantly from the prosperous nations they seek to reach. Thus, governments track migrant bodies as they move through multiple checkpoints along the travel continuum: pre-arrival, at crossing-stations, post-entry, and, increasingly, within their territories as well.

As part of the concentrated effort to achieve such migration and mobility management, pre-clearance 'electronic travel authorisation' is now required as a matter of course, even for those who benefit from visa-free travel and are in possession of internationally coveted passports. Such electronic pre-clearance must be applied for and approved by the government of the destination country before the travellers embark on their journey, and is linked electronically to their passports. Without such authorisation, it is impossible to board a plane or enter into the United States, Canada, or Australia. The European Travel Information and Authorization System (ETIAS), which will serve as a clearing house for pretravel authorisation for all 26 Schengen Area countries, is expected to become operational in 2021. This additional layer of pre-clearance and information-gathering creates a powerful yet invisible eBorder that is operational anywhere in the world, prior to departure, adjusting itself to the location and risk profile of the traveller. When the ETIAS proposal was adopted, Jean-Claude Juncker, then President of the European Union, justified the EU's commitment to rolling out this new system as a 'way to know who is travelling to Europe before they even get here'.²⁵ Such mandatory pre-travel authorisation is a classic manifestation of the shifting border's maneuvering of time and space, creating a cybernetic pre-warning system to 'help identify persons who may pose an irregular-migration or security risk before they arrive at the [actual] border'.²⁶ Such regulation is intentionally severed from and sequentially precedes the act of territorial arrival, thereby allowing the authorities to increase their 'seeing like a state' capacity, both outside and beyond their own respective territories.²⁷

Even prior to the COVID-19 pandemic, governments were also enthusiastically embracing biometric ePassports. These look like traditional passport books but contain an embedded electronic chip that encodes information about the passport bearer. Such embedded information includes a digital photo that can be verified against vast, unseen databases. While the chip deployed in biometric passports is 'passive' – it does not

²⁴UK Home Office, *Securing the UK Border: our vision and strategy for the future* (Cm 280648, 2007) ch1, para 4.

²⁵'Canadians Will Need to Apply for Travel Authorization to Visit Europe from 2023' (*Schengen Visa Info*, 14 March 2019) <www.schengenvisainfo.com/news/canadians-will-need-to-apply-for-a-travel-authorization-to-visit-europe-from-2021/> accessed 12 May 2020.

²⁶*Ibid.*

²⁷James C. Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1999).

transmit or track any information – it is not beyond the realm of possibility to imagine a future whereby ‘active’ tracking devices are involved. What’s more, global entry fast-tracks, which are already popular with trusted travellers in Asia, Europe and North America, rely on biometric identity verification using face, fingerprint or iris recognition – rather than traditional border inspection. Importantly, individuals currently select to enrol in these programmes; in a post-pandemic world, however, government regulation or industry standard may oblige them to do so. In this brave new world, automated, biometric and virtual borders will come to play a key role in the politics of mobility management, turning the bodies of migrants and travellers into the sites of regulation of movement and risk prediction.

As these examples illustrate, borders are not vanishing but rather are being reimagined and reinvented. The shifting border is at once multidirectional and slippery, but not in the transnational, open, and tolerant way foreseen by demise-of-the-state or post-Westphalian theorists. Instead, a darker, more restrictive orientation has emerged. Far from the dream of a borderless world that emerged after the Berlin Wall came down, today, we see not only more border walls but also the rapid proliferation of ‘portable’ legal barriers that may appear anywhere but are applied selectively and unevenly, with fluctuating intensity and frequency of regulation.

The shifting border has become a key pillar in an agenda shared by national governments (and increasingly, transnational actors and major commercial tech companies) to render populations digitally ‘legible’ and to strategically sort and regulate mobility. Its agile contortions make it increasingly difficult for unwanted migrants to set foot in the greener pastures of the more affluent and stable polities they desperately seek to enter. Conversely, wealthy migrants wishing to deposit their mobile capital in these very same countries find fewer and fewer restrictions on their admission, a bifurcation of immigration policy that invites the wealthy to jump the line.²⁸

A growing number of countries now offer exclusive, expedited pathways for the world’s super-rich to acquire citizenship ‘quickly and simply’ in exchange for a hefty investment.²⁹ A key example of this wealth-based fast-tracking is the recent surge of citizenship-by-investment programmes. These programmes – creatures of state control over membership boundaries – turn large money transfers into the core, if not sole, criterion for admission into the body politic. In certain cases, millionaire migrants need not even set foot in the new home country. With these policies, governments offer wealthy migrants the red-carpet treatment even as they restrict admission of ‘unwanted’ and ‘burdensome’ immigrants, including asylum seekers who have a legal right to enter their territories in search of protection.³⁰ Here, we see another manifestation of states’ ability to manipulate time and space, in this case to facilitate, rather than prohibit, admission for ‘high-value’ migrants. The inequalities created by state manipulation of borders are manifold, but are nowhere more explicit than in these programmes that enthusiastically welcome

²⁸Shachar and Hirschl, ‘On Citizenship, States and Markets’ (n 3); Katherine G. Young, ‘Rights and Queues: On Distributive Contests in the Modern State’ (2016) 55 *Columbia Journal of Transnational Law* 65.

²⁹I discuss these patterns in greater detail in Ayelet Shachar, ‘Citizenship for Sale?’ in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

³⁰This fixation on territorial arrival as the connecting factor activating the state’s asylum protection apparatus helps explain (but does not justify) the tremendous investment by states in devising new shifting-border regimes. If a person seeking asylum is blocked *prior* to arrival, the rights guaranteed under national, regional, and international protection regimes do not arise. See Shachar, *The Shifting Border* (n 16).

millionaire migrants while, as one author mildly puts it, ‘not being similarly open to refugees’.³¹

The shifting border gives states that officially declare their staunch commitment to human rights a legal arsenal with which to skirt their obligations without formally withdrawing them, operating to prevent aspiring newcomers from reaching the actual, territorial border. It allows governments – of prosperous societies, in particular – to continue to present themselves as global beacons of democracy and human rights while engaging in ever-more frantic efforts to avert certain arrivals in the first place. This divergent treatment of time, place, and space for different categories of migrants reveals the perplexing features of the new landscape of shapeshifting membership boundaries. States manoeuvre the border by controlling both the physical reality of territorial access – crucial for activating asylum obligations – and the legal requirements for admission, waiving spatial (and as I explain below, cultural, too) prerequisites for the super-rich who are admitted according to the heft of their wallets.

This duality of *preventive* shifting-border policies and *facilitative* admission for desired migrants is fuelling the paradox of restrictive closure and selective openness, which in turn helps explain the grand citizenship transformation we are witnessing. It also sheds light on the immense challenges faced by governmental actors pressed by current localist, nativist and nationalist backlash on the one hand and the still-influential globalist narrative on the other. As we shall see in the remainder of the discussion, policymakers are searching for a sweet spot to appease the populists, for example, by adding ever-more taxing cultural integration requirements, while at the same time competing for ‘desired’ migrants as well as borrowing and adopting border-regulation techniques from like-minded destination countries.

Instead of disappearing, as some predicted they would, state actors have reasserted themselves as discretely savvy and unexpectedly crafty entities when it comes to reinventing the power to include and exclude. They have done so through a whole new political imagination and cartography of control over borders and membership boundaries, indicating who is welcome in, or barred from, their respective ‘islands’ of stability and prosperity. Far from a static and immovable barrier, the border has become a mobile, agile, sophisticated, and ever-transforming legal construct – a *shifting border*, which can be planted and replanted in myriad locations, with dramatic implications for the rights and protections offered to those who fall within its remit of influence.

In a world where borders are transforming, but not dissolving, the question of legal spatiality – *where* a person is barred from onward mobility, and by *whom* – bears dramatic consequences for the rights and protections of those on the move. The same principle bears correlating duties and responsibilities for the countries that the migrants seek to reach and the transit locations they pass through. As it facilitates unequal access to desired destinations, this reinvention of the border touches on some of the most delicate and contentious issues that must be addressed by any membership regime without a global reach: defining who belongs (or ought to belong), and on what basis.

³¹See Leila Adim, ‘Between Benefit and Abuse: Immigrant Investor Programs’ (2017) 62 St. Louis University Law Journal 121, 134.

Cultural integration: shifting the burden from the state to the individual

Just as once-fixed territorial borders are shifting, so too are the boundaries of membership. A growing number of countries are redrawing these legal lines, erecting walls, visible and invisible, to separate migrants deemed worthy to embark on the ‘journey’ toward naturalisation (as the UK Home Office memorably put it) from those deemed unwanted and undeserving.³²

In Europe and beyond, a deepening ‘cultural anxiety’ about collective identity, coupled with the surge in populist nationalism, has seen the proliferation of rigorous integration requirements that blend territorial, cultural and economic barriers which are activated at different stages and phases of the said journey.³³ Such multipronged temporal and spatial frameworks of regulation ‘follow’ the individual as she passes through the proverbial gates of admission. Schematically, there are three main gates: *entry* (gaining lawful admission upon territorial arrival); *settlement* (securing a long-term residence permit in European legal parlance, equivalent to a ‘green card’ in the US); and, *naturalisation* (acquiring citizenship in the new home country).³⁴ Exceptions to this generic process may be made at the discretion of state authorities, but the logic at its heart remains same: a unidirectional transition from stranger to member.

Recent years have seen the fusion of ‘immigration control with immigrant integration concerns’.³⁵ This has turned the journey toward naturalisation into an unremitting ‘filtering process’,³⁶ widely regarded as the ‘most densely regulated and most politicized aspect of citizenship laws’.³⁷ Transnational accounts of this process highlight the ties that emigrants maintain to their original home countries, even as they forge new connections to a new one. But from the perspective of the admitting state, the function of contemporary integration measures is unambiguous: to put immigrants to the test, requiring them to ‘prove their ability and willingness’³⁸ to respect ‘our values, our ways of life’; in short, to prove that ‘they’ can become one of ‘us’.³⁹ It is impossible to overlook the implied ‘*nous*’ et les ‘*autres*’, narrative governing the whole process.

Another recent shift is in where and when this testing occurs. Inquiries into a prospective immigrants’ ‘assimilability, or ability to integrate culturally’ once took place primarily

³²A fascinating study conducted in the United Kingdom demonstrates that migrants themselves endorse the “deservingness” frame, and use it to distinguish among deserving applicants and “undeserving” migrants, namely those who fail to ‘prove their ability and willingness to be “good citizens”’. See Pierre Monforte, Leah Bassel and Kamran Khan, ‘Deserving Citizenship? Exploring Migrants’ Experiences of the “Citizenship Test” Process in the United Kingdom’ (2019) 70 *The British Journal of Sociology* 24.

³³Christian Joppke, ‘Civic Integration in Western Europe: Three Debates’ (2017) 40 *West European Politics* 1153, 1156. On cultural anxiety and ‘moral panic’, see Ralph Grillo, ‘An Excess of Alterity? Debating Difference in A Multicultural Society’ (2007) 30 *Ethnic and Racial Studies* 979, 980. See also Liav Orgad, ‘Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe’ (2010) 58 *The American Journal of Comparative Law* 53. The “return of culture” is defined here broadly to capture the growing centrality of the “claims of identity” (to draw on Seyla Benhabib’s terminology) in debates over immigration and integration, whether raised by members of minority or majority communities. See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002).

³⁴Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens, and Citizens in a World of International Migration* (Avebury, 1990) 16–18.

³⁵Sara Wallace Goodman, ‘Fortifying Citizenship: Policy Strategies for Civic Integration in Western Europe’ (2012) 64 *World Politics* 659; Christian Joppke, ‘Through the European Looking Glass: Citizenship Tests in the USA, Australia, and Canada’ (2013) 17 *Citizenship Studies* 1.

³⁶Stephen H. Legomsky, ‘Why Citizenship?’ (1994) 35 *Virginia Journal of International Law* 279, 291.

³⁷Rainer Bauböck and Sara Wallace Goodman, ‘Naturalisation’ (*European Union Democracy Observatory on Citizenship Policy Brief No. 2*, 11 Oct 2010) <<https://perma.cc/SU3W-SKDP>> accessed 12 May 2020.

³⁸Monforte et al (n 32) 6.

³⁹William Walters, ‘Secure Borders, Safe Haven, Domopolitics’ (2014) 8 *Citizenship Studies* 237, 247.

at the citizenship test or ceremony stage (the third and traditionally final gate).⁴⁰ But this screening and monitoring has recently been backtracked, conceptually, spatially, and temporally.⁴¹ It is now mandated at the earlier stage of establishing permanent residency (the second gate), and potentially even prior to gaining lawful admission in the first place (the initial gate).⁴²

Hiroshi Motomura lucidly articulates several different models for the relations between the newcomer and the society she seeks to join. The most inclusive view treats immigrants, once they have passed the first gate of admission, as ‘citizens-in-waiting’.⁴³ On the opposite end of the continuum, we find the view that immigrants, even those who have already successfully cleared the first and second gates, are nevertheless still ‘outsiders until shown otherwise’.⁴⁴ The induction of a robust civic integration paradigm, which I will explore in this section, patently manifests the prevalence of the latter over the former approach. Appraising whether the newcomer has rightfully ‘earned’ membership, today’s filtering processes place punitive consequences onto migrants, including the risk of ‘forfeiting one’s legal residence status or even first entry’.⁴⁵

The citizen-in-waiting model favoured granting the newcomer swift access to membership as a way to solidify and enhance integration. The ‘outsiders until shown otherwise’ conception prevalent nowadays rests on the inversion of the relationship between integration and membership, whereby a perceived failure to integrate into the new society is reason enough to *deny* passage through the sequential gates of admission, potentially barring the individual from entry *prior* to territorial arrival. Enhancing the state’s flexible power to exclude, this modern conception of membership manifests yet again the power of the shifting border, both as a tool of governance, and as an explanatory framework.

Consider, for instance, the Netherlands, a country that once had Europe’s most open-minded multiculturalism policy, but has since turned into the progenitor of the new civic integration paradigm that has spread worldwide like wildfire. The legal basis for this policy shift was the introduction of 1998 *Integration of Newcomers Act* (Wet inburgering nieuwkomers, or Win). Initially, this legislation was rarely enforced by the authorities. Over time, however, the coercive side of civic integration moved to the fore. Nowhere is this more evident than in the Dutch policy of ‘integration from abroad’, which creatively combined the territorial elasticity of the shifting border with the ‘culturalization of citizenship’.⁴⁶

With the invention of the integration from abroad policy, the Dutch parliament has adopted a new technique of *pre-entry* regulation which was, as one scholar aptly put it, ‘radically innovative: henceforth, foreigners who wanted to come to the Netherlands to live with a family member would have to demonstrate a basic level of knowledge of Dutch language and

⁴⁰David S. FitzGerald et al, ‘Can You Become One of Us? A Historical Comparison of Legal Selection of ‘Assimilable’ Immigrants in Europe and the Americas’ (2017) 44 *Journal of Ethnic and Migration Studies* 27.

⁴¹On the role played by citizenship tests in the naturalisation process in the US in the early twentieth century, see Amitai Etzioni, ‘Citizenship Tests: A Comparative, Communitarian Perspective’ (2007) 78 *The Political Quarterly* 353.

⁴²Sarah Wallace Goodman’s work on civic integration in European countries has been important and influential in identifying the shift from third to the second gate. See Sara Wallace Goodman, *Immigration and Membership Politics in Western Europe* (Cambridge University Press 2014).

⁴³Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford University Press 2007).

⁴⁴Ibid 9–12. Motomura also identifies as third model which goes beyond the scope of discussion in this article.

⁴⁵Joppke (n 33) 1155.

⁴⁶Jan Willem Duyvendak, Menno Hurenkamp and Eveliene Tonkens, ‘Culturalization of Citizenship in the Netherlands’ in Ariane Chebel d’Appollonia and Simon Reich (eds), *Managing Ethnic Diversity after 9/11: Integration, Security, and Civil Liberties in Transatlantic Perspective* (Rutgers University Press 2010).

society, *before* being admitted to the country'.⁴⁷ This piece of legislation, known as the 2006 *Integration from Abroad Act*, places an obligation on would-be immigrants to pass an integration-from-abroad test.⁴⁸ Successful passage of this test, and a preparatory course offered by Dutch embassies and consulates abroad, became a mandatory prerequisite to securing an entry visa. At the conclusion of the course, the applicant must demonstrate at least basic linguistic proficiency ('A1-level' Dutch) as well as knowledge of 'Dutch life and society', *prior* to arrival to the Netherlands. Here, passage through the gates of admission begins, both spatially and temporarily, long before the immigrant sets foot in the new home country.

The reversal of the order of the citizen-making process places a burden on the individual to integrate *in advance* of arrival, reflecting a 'philosophical shift from naturalization as a tool of integration to naturalization as the end-point of successful integration'.⁴⁹ This policy permits government officials to push the whole review process further back in time and space, adding a 'filtering' process before an applicant gains access to the territory. As certain rights and protections are derived from presence on the territory, and only become activated upon arrival, the decision to bar admission from afar – to block entry *there* rather than *here* – gives latitude to countries to limit the inflow of 'unchosen' migrants, including family members who have a legal right to enter according to both national and supranational law.⁵⁰ This is reminiscent of the shifting-border technique of preventing asylum seekers from reaching the territories of well-off societies, thwarting the ability to 'touch base' which is required to trigger protection obligations vis-à-vis the countries they are desperately trying to reach. Instead, those on the move and in need of protection are shut out long before they reach the gates of the promised lands of migration and asylum.

In this light, the ingenuity of the integration-from-abroad policy can be interpreted as part of the shifting border strategy, adding to the state's toolbox the possibility of pre-arrival cultural inspection, as well as territory-based requirements. By introducing a *preliminary* gate of admission (it can be thought of as 'gate zero'), which can be placed remotely at any consular office abroad, countries gain a significant, higher-resolution 'buffer zone'. As we have seen earlier, by relying on such techniques of restrictive closure and selective openness, states can continue to confess their commitment to lofty visions of human rights while at the same time doing their best to skirt such commitments without formally denouncing them. This approach is part of a paradigm shift taking place in the location and sequencing of bordering practices; in this context, integration-from-abroad requirements operate as an instrument of immigration control, which is imposed earlier and further away from the actual territory of the destination country. As Christian Joppke has sharply observed, the Dutch government 'openly calls its

⁴⁷Saskia Bonjour, 'The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union' (2014) 2 Comparative Migration Studies 203 (emphasis added).

⁴⁸These requirements are not applied universally, however. The Netherlands has granted exemptions from the "integration from abroad" requirements to entrants from certain countries, such as those arriving from Australia, Canada, the United States, Japan, and other rich nations. The impact of such pre-departure integration conditions is thus disproportionately born by family members, primarily from non-Western countries.

⁴⁹Christian Joppke, 'Comparative Citizenship: A Restrictive Turn in Europe?' (2008) 2 Law & Ethics of Human Rights 1.

⁵⁰Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 Theoretical Inquiries in Law 389. On the right to family reunification at the supranational level, see Council Directive (EC) 2003/86 on the right to family reunification [2003] OJ L 251/12.

integration-from-abroad policy a “selection mechanism”, and it considers the reduction of family migration (mostly from North Africa and Turkey) a welcome “side effect”.⁵¹

Once the Netherlands paved the way, other nations quickly followed suit. Integration from abroad is now required, in different variants, by Austria, Denmark, France, Germany, and the United Kingdom.⁵² In Germany, as in the Netherlands, pre-departure language tests at the A1-level must be passed in order to gain a right of entry as a family migrant, demonstrating to the authorities that the would-be immigrant is ‘motivated to integrate’. But this is only a preliminary step on a long and arduous road. Once in Germany, the newcomer must enrol in a 400- to 600-hour mandatory integration course (*Intergrations-kurse*). By the conclusion of this course of study, the applicant must prove attainment of a more advanced language competence skills (‘B1-level’). The integration course also includes a minimum of 100 hours of instruction devoted to learning about the country’s history, culture, and legal system as a precondition for acquiring a long-term residence permit.⁵³

Even this extensive ‘acculturation’ is merely a prelude. The second gate of admission will typically open only after the immigrant has resided in the country for at least five years (reduced to 3 years if married to a German citizen), and has diligently paid into the health and pension system for a minimum of 60 months. What’s more, the applicant must show proof of having sufficient funds to support oneself and one’s family without reliance on government assistance, revealing a growing trend of merging the tripartite territorial, cultural and economic criteria for integration.⁵⁴ The third gate of naturalisation opens up after 8 years and requires passage through a rigorous citizenship test and proof of economic self-sufficiency without reliance on welfare or unemployment benefits. To quash any remaining ‘suspicion’, new citizens must submit to the authorities a written and oral declaration of acceptance of the German Basic Law (*Grundgesetz*) and the ‘German way of life’ (s. 9(1)(2) of the Nationality Act).

In Denmark, which has taken a hardline anti-immigrant political turn, the requirements of civic integration are even more gruelling. Applicants seeking entry (the first gate of admission) must pass a language proficiency test and a civic exam. To sponsor a family member, supporting documents must be submitted to the authorities to establish that the family will reside in living quarters that provide at least 20 square metres per person.⁵⁵ (Germany, too, imposes a spatial requirement of adequate residence, although it is slightly less demanding – 13 square metres per person will suffice). To gain permanent residency (passage through the second gate), the person must have resided in the country at least five years and held gainful employment for at least 3 of the 5 years before submitting the application. In addition, an integration contract and declaration of loyalty must be

⁵¹Joppke (n 33) 1155 (quoting Saskia Bonjour, ‘Problematic Otherness’ in Saskia Bonjour, Andrea Rea and Dirk Jacobs (eds), *The Others in Europe* (Editions de l’Université de Bruxelles 2011) 57–58).

⁵²Bonjour (n 47).

⁵³EU citizens and those admitted to Germany as highly skilled migrants are exempted from such courses. See ‘Integration Courses: Learning German and Much More’ (*Germany Visa*, 9 July 2018) <www.germany-visa.org/immigration-residence-permit/integration-courses-learning-german-and-much-more/> accessed 12 May 2020.

⁵⁴‘Migration and Residence’ (*German Federal Office for Migration and Refugees (BAMF)*) <www.bamf.de/EN/Themen/MigrationAufenthalt/migrationaufenthalt-node.html> accessed 13 May 2020. Highly skilled migrants, who are deemed as ‘assets’ rather than potential ‘liabilities’ on the welfare system, are exempted from the linguistic proficiency pre-arrival tests based on the theory that they arrive with as secure job offer and therefore can immediately contribute to the labor market. We identify this pattern in Ayelet Shachar and Ran Hirschl, ‘Recruiting “Super Talent:” The New World of Selective Migration Regimes’ (2013) 20 *Indiana Journal of Global Legal Studies* 71.

⁵⁵Liav Orgad, ‘The Citizen Makers: Ethical Dilemmas in Immigrant Integration’ (2019) 25 *European Law Journal* 524, 528.

signed, committing the applicant to ‘work actively for the integration of myself and my family into Danish society’.⁵⁶ To acquire citizenship by naturalisation (passage through the third gate), the applicant must not have fallen on the public purse. This last requirement is part of a broader comparative pattern. In the United States, for example, the revamped ‘public charge’ rule came into effect in 2020, echoing a similar prohibition that turns reliance on welfare into an insurmountable barrier to adjustment of status. Finally, in line with the narrative mentioned earlier of ‘outsiders until shown otherwise’, the immigrant must successfully pass a citizenship test that has a notoriously high failure rate.⁵⁷ And to round out the process, those who have reached the finish line of this journey, are obliged to sign a ‘Declaration of Awareness’ of the rules and values of Danish citizenship.

In 2019, a new requirement was added under pressure from the right-wing populist Danish People’s Party: to complete the naturalisation process, participants in the citizenship ceremony must shake hands with the presiding officials. Refusal to do so, even if invoked on religious grounds (e.g., a request for accommodation or exemption by a devout Muslim woman who objects to physical contact in public with members of the opposite sex) is seen as proof of the failure of *that* individual’s ‘journey’ toward naturalisation. The country’s Integration Minister has proclaimed that the handshake at the citizenship ceremony is a performative speech-act, a ‘visible sign that you’ve taken Denmark to heart’.⁵⁸ It does not require a rocket scientist to interpret the subtext: if you have not taken Denmark to heart, you do not deserve citizenship. Without the handshake, the naturalisation process remains technically incomplete, meaning that the applicant will *not* become a citizen. In France and Switzerland, too, officials have treated the refusal of an observant Muslim woman to shake hands with male officials at the naturalisation ceremony as proof of ‘lack of assimilation’ which those states see as justifying denial of citizenship.

In 2020, with the coronavirus ravaging throughout Europe, Denmark postponed citizenship ceremonies in order to avoid the compelled-by-law handshake obligation. It might prove to be one of history’s little ironies if the COVID-19 pandemic leads the Danes to abolish this arguably discriminatory and overbearing requirement at the citizenship ceremony.

Adherence to sincere (admittedly strict variant of) religious belief has proven a hazard all over the world for women hailing from marginalised and feared minority communities. This is not a phenomenon restricted to European countries. Even multicultural Canada, for a period, banned face-covering during the oath-taking stage of the naturalisation ceremony, effectively denying access to citizenship for adherent Muslim women who were not willing to ‘park their religion at the courtroom door’.⁵⁹

⁵⁶Liz Fekete, ‘Enlightened Fundamentalism? Immigration, Feminism, and the Right’ (2006) 48 *Race and Class* 1, 3.

⁵⁷Approximately two-thirds of those who take the citizenship test do not pass it. My description here draws on Orgad (n 55) 528.

⁵⁸Martin Selsoe Sorensen, ‘Denmark, With an Eye on Muslims, Requires New Citizens to Shake Hands’ *New York Times* (New York, 20 December 2018) (quoting Danish integration minister Inger Støjberg) <www.nytimes.com/2018/12/20/world/europe/denmark-muslims-handshake-law.html> accessed 13 May 2020.

⁵⁹For further discussion, see Ayelet Shachar, ‘Constituting Citizens: Oaths, Gender, Religious Attire’ in Richard Albert and David R. Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press 2017). See also *R v NS*, 2012 SCC 72.

These illustrative examples reveal that a heavy burden is passed on from the state to the individual to prove her 'worthiness', as defined by majority standards, to access membership.⁶⁰ As several commentators have noted, these requirements reveal a puzzling combination of assimilationist pressures in the civic integration paradigm, along with a neoliberal conception of individualised responsibility, whereby 'deserving' immigrants must demonstrate their value-adaptation to prevailing norms as a condition for passage through the multiple gates of admission.⁶¹ The seeds of such transformation were already present in the early 2000s. In the words of an official in the Dutch Justice Ministry outlining the spirit of the new civic integration paradigm: 'everyone is responsible for his [or her] own integration'.⁶² By contrast, those who 'through their deeds and/or speech' are perceived to have *defied* the ways of life and cultural propensities of the new home country, are seen to have belligerently ousted themselves from the collective.⁶³ As such, license is provided to entrench ever-tougher legal measures against them. In extreme cases, the ultimate reprimand is 'de-nationalization', or withdrawal of citizenship *post*-naturalisation.⁶⁴

Here, in this post-citizenship de-nationalization, we see a new, 'fourth gate', in the journey to full membership, an emergency valve or exit-way that opens up *ex post facto*. The ability to de-nationalize citizens *after* they have completed the process of naturalisation is another manifestation of the malleability of the shifting border, here stretching the regulatory timeline beyond the supposed endpoint. This power remains contentious in both law and political theory debates, and even where governments can resort to this option, they are required to use it sparingly and only as a last resort.⁶⁵

The paradigm of civic integration thus shifts the focus from the institutions and processes of inclusion *facilitated* by the recipient society, into a burden or 'test' of personal capacity, character, and responsibility. The burden is passed onto the individual, who has to demonstrate her effort, willingness and commitment to accept the laws and institutions of the admitting society (as if these are inherently foreign to her 'culture').⁶⁶ These policies require her, also, to show value-adaptation, again, echoing an assumption that immigrants must be freed from their 'barbaric cultural practices', to use a controversial

⁶⁰See e.g., John R. Bowen, 'How the French State Justifies Controlling Muslim Bodies: From Harm-Based to Value-Based Reasoning' (2011) 78 Social Research 325. See also Triadafilopoulos, 'Illiberal Means to Liberal Ends? Understanding Recent Immigrant Integration Policies in Europe' (2011) 37 Journal of Ethnic and Migration Studies 861, 867, arguing that 'boundary maintenance' is 'increasingly cast in terms of value compatibility'.

⁶¹Monforte et al (n 32) 2. On the notion of citizens in the making, see Orgad (n 55). The notion of deservingness has been expressed in official government documents and studied extensively by sociologists, anthropologists, political scientists, and legal scholars. For an early comparative contribution to this burgeoning literature, see Ricky Van Oers, *Deserving Citizenship: Citizenship Tests in Germany, the Netherlands, and the United Kingdom* (Martinus Nijhoff 2014). For an exploration of these themes from the perspective of immigrants undergoing naturalisation, see Bridget Byrne, 'Testing Times: The Place of the Citizenship Test in the UK Immigration Regime and New Citizens' Responses to it' (2017) 51 Sociology 323.

⁶²Christian Joppke, 'Immigrants and Civic Integration in Western Europe' in Keith Banting, Thomas J. Courchene and F. Leslie Seidle (eds), *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Institute for Research on Public Policy 2006) 15.

⁶³Triadafilopoulos (n 60) 862.

⁶⁴For earlier interventions that identified this broader trend, see e.g., Matthew J. Gibney, 'Should Citizenship be Conditional? The Ethics of Denationalization' (2013) 75 Journal of Politics 646. See also Shai Lavi, 'Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel' (2010) 13 New Criminal Law Review 404.

⁶⁵For illuminating discussion, see Rutger Birnie and Rainer Baubock, 'Introduction: Expulsion and Citizenship in the 21st Century' (2020) 24 Citizenship Studies 265. See also Ming Hsu Chen, *Pursuing Citizenship in the Enforcement Era* (Stanford University Press 2020).

⁶⁶On this shift, see e.g., Tamar de Wall, '"Make Sure You Belong!" A Critical Assessment of Integration Requirements for Residential and Citizenship Rights in Europe' (2019) 25 Buffalo Human Rights Law Review 37.

term from the citizenship-test preparation guide of none other than multicultural Canada.⁶⁷

The volume and intensity of the various ‘culturalization of citizenship’ policy instruments I have quickly reviewed is nothing short of breathtaking. This new phenomenon has been described as one of the ‘most visible if not the most significant policy change’ in the field of citizenship and immigration in recent years.⁶⁸ Some scholars, though, have claimed that reliance on such value-laden requirements of cultural and linguistic integration is not necessarily as novel or unprecedented as much of the literature suggests. As these scholars point out, the rising emphasis on the individual merit of the newcomer has served in part to replace past barriers that were ascriptive and thus insurmountable, such as racial categorizations.⁶⁹ These scholars taking in the long-haul view do not contest the significance of the new wave of cultural requirements, but they place it within a broader historical, legal and policy trajectory. With the rise of formal constitutional prohibitions against discrimination on account of ‘suspect categories’ (such as race, gender, and ethnicity), and of international human rights, rule-of-law societies are now prohibited from any form of direct, explicit reliance on discriminatory criteria to restrict admission. It is partly in response to these new restrictions that we now witness the proliferation of substitutes such as ‘culture’, ‘collective identity’ or ‘civic integration’, which importantly permit passage through the gates of admission to applicants from *any* background, but continue to sort, and arguably favour (or disfavour) certain groups over others.

These substitute forms of indirect discrimination are harder to challenge than more explicit exclusions because they are inherently contested and vague, and, more importantly, remain facially neutral. As long as any newcomer can ascent to membership by proving her ability to learn, attest, and adhere to these requirements of integration, it is difficult to claim any discriminatory intent. The more interesting question is whether disparate *impact* is the more relevant legal standard. Linguistic proficiency might prove a valuable test case. In principle, such a requirement appears fair and open to all, and could be justified, both principally and instrumentally, as an enabler of inclusion in a new society. In practice, however, these tests may function as tools of exclusion, as certain segments of the population, such as those with lower literacy rates (or no literacy at all), or migrants hailing from certain regions of the world systemically find these language tests more forbidding.⁷⁰

At this point in time, the tide of civic integration does not appear to be receding, but may indeed still be on the rise. In a classic pattern of inter-jurisdictional ‘borrowing’ across

⁶⁷In a text box referring to the equality of women and men, the text reads: ‘In Canada, men and women are equal under the law. Canada’s openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, “honour killings”, female genital mutilation, forced marriage or other gender-based violence. Those guilty of these crimes are severely punished under Canada’s criminal laws’. See Citizenship and Immigration Canada, *Discover Canada: The Rights and Responsibilities of Citizenship* <www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/discover.pdf> accessed 13 May 2020, 9.

⁶⁸Goodman (n 35) 659.

⁶⁹FitzGerald et al (n 40) 2. The authors of this article compare the twenty-first century’s suite of civic integration requirements to previous historical precedents, identifying a trend away from group-based racial categories and toward a heightened testing of individuals’ capacity to integrate.

⁷⁰Linguistic proficiency requirements typically have built-in exceptions based on age or mental capacity, but not on account of illiteracy. See Etzioni (n 41) on the history of the linguistic proficiency test in the United States. For a critical account of linguistic proficiency tests in the European context, see Astrid von Busekist and Benjamin Boudou, ‘Language Proficiency and Migration: An Argument Against Testing’ in Michele Gazolla, Torsten Templin and Bengt-Arne Wickström (eds), *Language Policy and Linguistic Justice: Economic, Philosophical and Sociolinguistic Approaches* (Springer 2018) 189–208.

continents, as of January 2020, Québec – Canada’s Francophone province – now requires that *prior* to even submitting an application to immigrate to its shores, each person must complete an online evaluation to prove their ‘value attestation’ to democratic and Québec values.⁷¹ This is the first North American variant of the pre-arrival cultural integration and regulation model we saw earlier, requiring applicants to prove their knowledge of and adherence to certain core values, prime among them the affirmation of Québec’s identity as Francophone, democratic, and secular (*La laïcité de l’État Québécois*).⁷²

In the United Kingdom, official government documents dating back to the early 2000s deploy the ‘journey’ metaphor.⁷³ This journey, as the name indicates, is an *ongoing* process, stretching legally and temporally across the different stages of pre- and post-entry processing, at naturalisation, and possibly thereafter, subject to de-nationalization orders. Instead of a ‘static “badge” of honour at the end of the journey’,⁷⁴ migrants are put under the microscope to discern their ‘preparedness’ to become full members.⁷⁵ Governments, already under pressure to ‘pacify native citizens that immigrants do not threaten their way of life and collective identity’, have taken this mandate and stretched it like a muscle on steroids.⁷⁶

So far, I have described culture as a barrier to access, but in the world of 3D citizenship, it can also serve as a preferential pathway to obtaining nationality by stretching the temporal and spatial multiplier of citizenship transmission by descent (*jure sanguinis*). This is perhaps most clearly evident in the case of dual nationality by birth, whereby countries allow successive generations of ‘heirs’ to obtain the legal status of citizenship, if their parents, grandparents, or even great-grandparents, were born in that country.⁷⁷ As suspicion about ‘unchosen’ immigrants has been mounting, enflamed by the rise of populist nationalists, we have seen a peculiar combination emerge of restrictive closure toward ‘the other’ and selective openness toward co-ethnic-diasporas abroad, inviting the progeny of emigrants who have left their ancestral countries to ‘reclaim’ their membership. Here, too, cultural, linguistic, religious and ethnonational criteria come to fore, as governments rely on the language of national heritage and shared culture to encourage ‘re-integration’ of the lost sons and daughters of the nation. While the territorial link is broken, ‘culture’ (often used here as a code word for ‘bloodline’ or ethnonational ties) serves as a compensatory connecting factor to justify the return, or more typically, the acquisition, of dual nationality in the individual’s ancestral homeland.⁷⁸

⁷¹The province of Quebec has joint-jurisdiction with the federal government on certain matters of immigration, especially the requirement that newcomers demonstrate linguistic proficiency in French.

⁷²For further details, see ‘Attestation of Learning about Democratic Values and the Québec Values Expressed by the Charter of Rights and Freedoms’ (Ministère de l’Immigration, de la Francisation et de l’Intégration) <<http://www.immigration-quebec.gouv.qc.ca/en/immigrate-settle/attestation-values/index.html>> accessed May 25, 2020.

⁷³Immigrants must pass the “Life in the United Kingdom” test (first introduced in 2005) before they can complete their post-birth citizenship acquisition, see ‘Life in the UK Test’ (GOV.UK November 27, 2014) <<https://www.gov.uk/life-in-the-uk-test>> accessed May 25, 2020.

⁷⁴Dina Kiwan, ‘A Journey to Citizenship in the United Kingdom’ (2008) 10 International Journal of Multicultural Societies 60, 69.

⁷⁵Byrne (n 61).

⁷⁶Sara Wallace Goodman and Matthew Wright, ‘Does Mandatory Integration Matter? Effects of Civil Requirements on Immigrants Socioeconomic and Political Outcomes’ (2015) 41 Journal of Ethnic and Migration Studies 1885.

⁷⁷Italy’s citizenship law offers a classic example of this model at work. See Parliament Act of 5 February 1992 nr. 91, New Norms on Nationality, Gazzetta Ufficiale of 15 February 1992 nr. 38.

⁷⁸Maarten Vink et al, ‘The International Diffusion of Expatriate Dual Citizenship’ (2019) 7 Migration Studies 362; Harpaz (n 3). Countries may require detailed proof of family history, birth and death certificates, and accompanying governmental or community-produced documents to establish the evidentiary basis to support the claimed ancestral links.

By contrast, culture remains as a tool of exclusion for long-term residents who do not possess the prerequisite ‘lineage’ to reclaim membership. This duality of restrictive closure and selective openness permits the axis of culture to operate both as a gateway for inclusion of descendants with ‘unbroken’ ties to the country and a pretext for exclusion of long-term residents, keeping them in the position of ‘outsiders until shown otherwise’.⁷⁹

Such advantaged access has been described as emancipatory for the individuals involved, which may well be the case for those who possess the required cultural connection because of ‘the blood that flows in their veins’ as one observer sharply put it. However, this can also be interpreted equally persuasively as a multiplier of brute luck on a global scale, a multigenerational amplifier of the birthright lottery, extended to the Nth generation. Here, culture is a proxy for unequal access rather than its mitigator.

Economics: wealth as a passport to citizenship

Let us now turn to the third dimension of citizenship’s transformation: the economic. As with territory and culture, wealth-based criteria can serve selectively as both a barrier and an expedient to membership. I’ll briefly describe the restrictive function of economic criteria, which is regaining attention in the literature after many years of neglect, and then turn to a more thorough exploration of the fascinating yet deeply disruptive ‘alchemy’ of turning wealth into a golden passport to citizenship.

In addition to mounting territorial barriers and heightened cultural assimilation requirements that immigrants now face (discussed in the previous sections), some of the richer destination countries are also imposing higher and higher economic prerequisites to naturalisation. Requirements range from an obligation to participate in the economy and to ‘earn a living’ (assessed against minimum income levels), to the demand that immigrants prove that they never applied for, or collected, welfare benefits.⁸⁰

In Europe, many countries have such economic requirements. Germany imposes minimum income requirements. Denmark requires that applicants not draw on welfare benefits. Belgium mandates proof of employment and Finland requires a declaration of the origin of the migrant’s income.⁸¹ A 2018 comparative study has estimated, remarkably, that

about 60–70% of Austrian female blue-collar workers would *not* be able to meet the income requirements for naturalization in Austrian citizenship law. Consequently, if an “average” female blue-collar worker had not acquired citizenship by descent – being born to Austrian parents – she would be excluded from citizenship and the rights that come with it.⁸²

If this is true for native-born members of the community, imagine the economic barriers that newcomers face.⁸³

⁷⁹Detailed proof of family history, birth and death certificates, and accompanying governmental or community-produced documents is required in order to establish the evidentiary basis for such unbroken ties or ancestral links.

⁸⁰Jeremias Stadlmair, ‘Earning Citizenship: Economic Criteria for Naturalisation in Nine EU Countries’ (2018) 26 *Journal of Contemporary European Studies* 42, 45.

⁸¹*Ibid.*

⁸²*Ibid* 48 (citing Joachim Stern’s data findings) (emphasis added).

⁸³Such economic barriers tend to disproportionately harm women and members of minority communities. For a concise overview of the literature, see Daphna Hacker, *Legalized Families in Era of Bordered Globalization* (Cambridge University Press 2017) 149–96.

In the United States, new restrictions to the acquisition of permanent residency (the second gate) took effect in 2020, expanding the definition of ‘public charge’ to new programmes, such as the food stamps – a federal programme providing assistance to low or no-income household with young children to purchase staple items such as bread and milk. Factors that may count against the applicant include insufficient savings, financial liabilities, previous approval to receive a public benefit, low credit score, absence of health insurance, education, or language skills, and having a sponsor who is unlikely to provide financial support. Each of these factors has clear socio-economic underpinnings. Here, the idea of *earning* membership takes on a dual meaning of proving one’s ‘deservingness’ – complying with the increasingly demanding and value-laden standards of civic integration, and, of economic self-sufficiency.

The emphasis on economic self-sufficiency adds yet another dimension of boundary-drawing which makes citizenship harder to acquire, even for long-term residents, indirectly reactivating the deeply discredited historical connection between property and citizenship. Derek Heather observes that treating wealth qualifications as a precondition for membership is ‘as old as the status of citizenship itself.’⁸⁴ It was not until the French Revolution that the decision to abolish titles of social rank and transform all fellow-members into equal *citoyens/citoyennes* (a promise that has yet to fully materialise). While still the declared principle, citizenship is nonetheless made *easier* to acquire for those at the top echelon, who can literally purchase it for a hefty sum, even if they have only the most remote ties to the admitting country.⁸⁵

In recent years, a growing number of countries have been selectively opening their gates of admission and rolling out the red carpet for ‘elite’ migrants. A new global stratification is in the making. Across the globe, governments are proactively promoting expedited, simplified pathways to citizenship for the rich and affluent, in exchange for a substantial investment or ‘donation’. Here, wealth-based criteria do not restrict mobility and migration, but rather *facilitate* it – though only for the very prosperous.

The bolted gates of admissions, so carefully guarded when it comes to the many, are swung open when it comes to the select few: the global 1 percent. *Their* journey to membership is paved with ‘golden visas’ and ‘golden passports’. More than half of the world’s countries now offer such preferential treatment in securing residence or citizenship. It isn’t cheap, though: a European citizenship, to provide but one example, ranges between 1 and 2 million Euros. These programmes create a link between money transfers in large quantities and expedited bestowal of citizenship. In certain cases, millionaire migrants need not even set foot in the new home country.⁸⁶ This transactional approach reveals a new (and troubling) hierarchy in access to membership. While those escaping violence and persecution abroad have no pathway except to risk their lives to cross ever-shifting borders, others, who think nothing of transferring millions with the click of a button, enjoy fast-track naturalisation.

These new policies of selective inclusion and exclusion on economic grounds reveal the kaleidoscopic versatility of the three-dimensional transformation of citizenship that I have explored throughout this article. They also attest to the inequalities and injustices

⁸⁴Derek Heather, *A Brief History of Citizenship* (NYU Press 2004) 66.

⁸⁵For detailed discussion, see Shachar, *Citizenship for Sale?* (n 29).

⁸⁶The term ‘millionaire migrant’ is drawn from David Ley, *Millionaire Migrants: Trans-Pacific Life Lines* (Wiley-Blackwell 2010).

embedded in the tremendous discretionary powers that states have granted themselves to define spaces of im/mobility and to govern (moving) bodies in relation to shifting borders and elastic membership boundaries. We saw earlier that well-off countries resort to highly sophisticated shifting border techniques in their attempts to block the territorial arrival of uninvited migrants, including asylum seekers, and to culturally weed out, pre-arrival, those deemed ‘unfit’, even if they formally have a right to enter as family migrants.

When it comes to the super-rich, governments go out of their way to *waive* the requirement of territorial arrival, if that helps lure high-net-worth-individuals’ mobile capital to their respective shores. Ditto regarding linguistic proficiency or civic integration requirements. Wealth acts here as a ‘substitute’ for cultural integration, despite the fact that these two realms appear incommensurable. If these requirements are waived for some, why are they imposed on others? This inconsistency is hard to square with equal treatment, due process, or the emphasis on ‘acculturation’ – otherwise strictly enforced. If access to citizenship merely tracks privilege, power, and financial might, it becomes hard to tolerate on democratic, civic republican, liberal and radical conceptions of state and society. Allowing the transfer of funds alone to be a basis for membership, completely detached from any kind of connection to the said polity – residence, commitment, even presence – is not merely a change in form. Instead, it touches on the very civic fibre of citizenship in a way that may impact the substantive content and expressive value of the good being transacted. Turning membership into a commodity that can be acquired through a purchase-and-sale agreement has the potential to erode the relational foundations of sharing in a political community, or the ‘ties that bind’. This transactional framework is controversial in part because it assumes that nothing is lost in the conversion.

These tensions have come to a head in the United States, which has taken a belligerently restrictive, tough-on-immigration approach under the Trump administration. Even here, the government has continued to exercise a policy of selective openness for ‘desirable’ (read: millionaire) migrants. Two examples from 2017, Trump’s first year in office, demonstrate the duality. That year, the administration revoked the Deferred Action for Childhood Arrival (DACA) policy, which allowed children brought to the country as infants, called ‘Dreamers’, to remain there and to work and study in the United States. In the very same year, the administration *renewed* and *expanded* the EB-5 or ‘golden visa’ programme for super-rich ‘Parachuters’ to enter the country on the heft of their wallets. This programme offers the world’s wealthy a coveted pathway to a green card, jumping to the front of the line through premium processing. The price of admission? As of 2019, it stood at US\$1.8 million (up from US\$1 million). A discounted investment of US\$900,000 (up from US\$500,000) will suffice if the monies are funnelled to target employment areas, which are defined as distressed areas but have in the past been used to finance luxurious real estate projects in urban centres or ritzy ski and golf resorts. This has resulted in staunch criticism of the programme.⁸⁷

This contrast in legal treatment of ‘Dreamers’ and ‘Parachuters’ disrupts our most fundamental intuitions about the meaning and attributes of the relationship between the individual and the political community to which she belongs. Whereas the super-rich secure an easy-pass fast-track to citizenship, the Dreamers, educated in the United States and

⁸⁷The new rules governing the EB-5 programme are designed to counter the possibility of such ‘gerrymandering’. ‘EB-5 Immigrant Investor Program’ (*U.S. Citizenship and Immigration Services*) <www.uscis.gov/eb-5> accessed 13 May 2020.

raised 'American', with widespread popular support, have no legal pathway to establish a secure status in the only country they know as home. With the revocation of their deferred standing, the sword of deportation is hanging over their heads.⁸⁸ Meanwhile, for the Parachuters, the footloose members of the global 1 percent, the transfer of funds acts as a substitute for the arduous – indeed, often near impossible – process of territorial entry and civic integration.

Such blatant inequality in the treatment of different categories of would-be members – those who bask in money, but have few actual ties to the polity versus those with deep, genuine links but little money – calls out the lie of civic integration. If genuine links mattered an iota, the gates of admission would open more widely for the Dreamers and remain closed more tightly for the Parachuters, at least until the latter have established real, meaningful ties to the new home country whose membership they buy 'off the shelf' like a luxury product, rather than a lifesaver, as it is for less well-off migrants.

The American golden visa programme has many counterparts in other desirable destination countries, which similarly cater to the global 1 percent. Consider the sums involved, which are significant, ranging from the near US\$2 million mark in the United States (edging closer to \$US1 million for specially designated areas) to a minimum of £2 million in the United Kingdom for a leave of remain (the greater the investment, the shorter the wait time for settlement). In Australia the 'significant investor' visa is open to those who are willing to invest more than AU\$5 million, while the super wealthy can apply for a 'premium' visa that will fast-track them to residency within twelve months in exchange for the whopping sum of AU\$15 million. Portugal's golden visa programme grants residency to global investors in exchange for €500,000 in property or capital investments, coupled with 'extremely reduced minimum stay requirements'. Malta, the smallest member state of the European Union, has gone a step further, putting its citizenship up 'for sale', offering speedy naturalisation in return for a non-recoverable donation to government coffers to the tune of €1.15 million, opening a gilded back door to European citizenship. Such a brazen transaction does something that none of the European countries, including those with 'golden visas' and residency permits, were willing to do, waiving territorial presence and cultural integration requirements altogether. Following a storm of criticism, culminating with a special session held in the European Parliament during which the then Vice President of the European Commission declared that 'citizenship is not for sale!', Malta eventually revised its policy by including a nominal one-year residency requirement, which, in practice, can be fulfilling by simply having an address in the country, not necessarily residing in it. The government did not, however, back down from its bolder scheme: placing a price tag on Maltese (and European) citizenship.

The Maltese 'business model' was imported to Europe by transnational intermediaries – global law firms specialising in the citizenship trade – drawing upon the experiences of Caribbean and the Pacific island nations that have been selling 'passports of convenience' since the late 1970s. Today, in a deflated market, a freshly-minted passport from some of these countries will be issued in as little as 90 days in exchange for roughly \$150,000. While promising to follow strict due diligence standards, these programmes have long been prone to fraud, corruption, and money laundering. For the purchaser, these programmes

⁸⁸This contrast is elaborated in Ayelet Shachar, 'The Marketization of Citizenship in an Age of Restrictionism' (2018) 32 *Ethics & International Affairs* 3.

permit access to visa-free travel, tax advantages, and may also serve to shelter the applicant's wealth from reporting obligations.

While the specific details of different countries' programmes vary, they all rely on a shared premise: giving the world's affluent an opportunity to acquire citizenship based on wealth not allegiance, bypassing standard residence, linguistic proficiency, and related civic-integration requirements that states otherwise vigorously enforce, as we have seen in the previous section.⁸⁹ Such stratification and commodification cuts against the ideal of equal, democratic citizenship. It also revives the old spectre of property-based citizenship, a concept that took centuries of concentrated social struggle to undo.

Laws and regulations governing preferential access offer a rare window into the undercurrents that inform the conflicting and competing patterns of change that I have explored throughout this article. With growing fears of 'loss of control', an increasing number of countries impede passage to most would-be migrants, even as they seek out 'high value' citizens to incorporate into their political communities.⁹⁰ I hope to have shown that while important lessons can be learned from restrictions on access to citizenship, equally revealing insights can be unearthed by focusing on who is given the red-carpet treatment and, especially, on *what* basis.

Nothing in the conventional accounts of citizenship as encompassing rights, status, identity and participation, or in predictions of the state's demise, can explain the proliferation of these increasingly instrumental, flexible, and market-oriented approaches to citizenship.⁹¹ Yet it is clear that this transformation is a reality of modern law and policy, as governments not only permit but actively facilitate such transactions. Increasingly, for the world's monied elite, the transfer of mobile capital is a golden passport to citizenship, in striking contrast with the emphasis on territorial presence and cultural integration for almost all other would-be entrants, treated as 'net burdens'.⁹² Underlying this commodification of membership is what I have called the grand transformation of citizenship, and with it, the fundamental fact of the shifting border, at work across multiple facets of law and political imagination. By highlighting these tensions and contradictions, we can begin to observe the paradoxes and inequality embedded in these new realities of governance. By exposing these dark corners of the grand transformation of citizenship we gain front-seat view of the entrepreneurial reimagining of the body politic that is underway.

Concluding remarks

My goal throughout this article has been to refine existing accounts, which emphasise either the tightening or the lightening of access to citizenship and the openness or

⁸⁹Some countries initially offer expedited admission, some permit direct access to permanent residence, whereas others expeditiously issue citizenship certificates and passports.

⁹⁰This new trend brings to the fore core questions about the future of citizenship which go beyond the scope of my discussion here, highlighting the risks and opportunities that attach to states taking on the role of 'brokers' of paid-for citizenship grants that exacerbate inequality in global mobility and membership regimes while depleting citizenship from within.

⁹¹For illuminating ethnographic and geographical accounts of the flexible use of citizenship by transnational individuals and dynastic families, see Aihwa Ong, *Flexible Citizenship: The Cultural Logic of Transnationality* (Duke University Press 1999). The focus of my discussion here, by contrast, is on state policies that create avenues for the rich and wealthy to purchase citizenship, rather than the strategies employed by those taking advantage of these opportunities.

⁹²As I explain elsewhere, another fascinating set of migrant categories to explore are highly skilled migrants, and especially those with super-talent in the arts, sciences, and sports. See Ayelet Shachar, 'Picking Winners: Olympic Citizenship and the Global Race for Talent' (2011) 120 Yale Law Journal 2088. See also Shachar and Hirschl (n 55).

closure of borders. The remarkable reality we witness, however, is that *both* patterns exist, *simultaneously*. We must therefore shift our attention from perpetual either/or debates to a more nuanced set of questions, exploring who might gain, why, how, where, and under which dimensions of the regulation of membership boundaries. The malleability of territory under the shifting border has allowed states to regulate mobility from a distance while at the same time increasing their surveillance powers at home. This trend has only accelerated in the wake of a global pandemic. Nowadays, the unmooring of the sovereign authority to regulate migration from a fixed geographical marker permits desired destination countries with commitments to human rights values to uphold them in name while nonetheless simultaneously skirting such commitments; this is accomplished by retaining the notion of territorial arrival as a prerequisite for asylum protection and making it close to impossible to accomplish. Similarly, the revamping of cultural integration requirements has made entry, settlement, and naturalisation ever-more closely monitored and policed, adding a boundary-drawing mechanism that ensures the 'us' does not contain an unsuitable 'you'.⁹³ Again, as with the reinvention of territory, the impact is uneven, placing greater obstacles on those target populations deemed 'others' by prevailing majorities, especially in the context of populist nationalism. By shifting the responsibility to the individual to demonstrate her value-adaption, newcomers carry the brunt of 'proving' their deservingness to an ever-higher standard of proof. When the economic dimension is added, we witness a switch from restrictive closure to selective openness. Those with deep pockets find golden pathways.

While many had predicted the waning of sovereignty and the decline of citizenship, the account offered here challenges this unidirectional trajectory. Borders and membership boundaries are certainly not disappearing; rather, they are transforming. States jealously guard their prerogative to grant citizenship as a formal legal status, treating it as a valued asset. As we have seen, pathways to entry, settlement, and naturalisation can be made more or less accessible at the discretion and of destination countries, at different junctures, and based on a tremendous range of possible intersections among the tripartite dimensions studied here: territory, culture, wealth.

Assuming that policymakers are acting rationally, they would not invest such tremendous resources in shielding borders and membership boundaries if they were not guarding something highly valuable – politically, symbolically, and materially. The 'premium' of acquiring citizenship in a safe, stable, and affluent country is immense, especially for those who have received the short stick in the birthright lottery. Countering the thesis of the 'demise', 'death' or 'devaluation' of citizenship, the evidence I have provided here shows that, as migration and mobility pressures mount in an interconnected world, the impetus increases for well-off societies to strictly guard access to citizenship, allocating it gingerly and selectively. Revamping their control over the power to assign membership, a *domaine réservé* of states, governments have proven far more entrepreneurial than anticipated. Voters, too, have raised the stakes, pushing governments in richer destination countries towards what might be seen as a near obsession with 'regaining' control over their alleged waning sovereignty.

⁹³Eva-Maria Schneidhofer, 'Citizenship Tests as Instruments of Power: The Case of the Dutch Integration Exams' (MA thesis, Universiteit van Amsterdam 2008) 5.

Governments have also dramatically expanded the purview of their control of movement, stretching its reach both spatially and temporally before and after admission to the country. For those not born as members, access to citizenship is tightly regulated and must be 'earned'. In the United States, the same instinct to keep a close tab on the prized possession of citizenship has led anti-immigrant politicians to not only push for a border wall and aggressive, shifting-border techniques, but also to make it harder for long term residents to pass through the sequential gates of admission. We saw earlier that the receipt of food stamps is now deemed an 'offense' justifying denial of one's adjustment of status. Here again the shapeshifting border reveals a harsh matrix of inclusion/exclusion depending of where we stand in relation to the territorial, cultural, and economic dimensions of the kinetic constellations that make up the 3D citizenship paradigm. Each part of this multidimensional whole offers leverage that can be relaxed or tightened, thereby playing a key role in sustaining a highly unequal system of membership allocation, according to which some are born to endless night, others to a sweet delight.

Throughout the writing of this article, COVID-19 has again shown us that deep inequalities in life and death prospects persist even within political communities. It has also revealed the dangers of not having formal status. Migrant workers were left with no access to health care or protective gear while performing essential services. Those without status avoided hospitals for fear of being deported if they came out of the shadows. But the very same crisis has shown us, too, that another future is within reach. Consider the path taken by the Portuguese government, which in response to the pandemic declared that all immigrants already on its territory, including asylum seekers, would gain access to the same rights as citizens to 'health, social security, and job and housing stability as a duty of a solidarity society in times of crisis.' Here, passage through the multiple gates of admission was fast-tracked, not for the super-rich, but for those who, through their territorial presence, civic integration, and everyday contributions *became* members of the new society they sought to join.